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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

In re

RICHARD JIMENEZ,

on Habeas Corpus.

B225682

(Los Angeles County
Super. Ct. No. BH006670)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Reversed.

Edmund G. Brown, Jr., Kamala D. Harris, Attorneys General, Julie L. Garland, Assistant Attorney General, Jennifer A. Neill and Pamela B. Hooley, Deputy Attorneys General, for Appellant.

James M. Crawford, under appointment by the Court of Appeal, for Respondent.

The Warden of Avenal State Prison appeals from the trial court's order granting the petition for writ of habeas corpus of defendant Richard Jimenez. We vacate the trial court's order granting the writ and we reinstate the Governor's decision to deny parole to Jimenez.

FACTS AND PROCEEDINGS

In 1986, defendant gang-member Richard Jimenez approached Juan Valdez, who was unarmed. Jimenez asked Valdez where he "was from." Valdez replied, "El Sereno," a rival gang. Jimenez shot Valdez once in the abdomen with a rifle. Valdez died. Jimenez thereafter pleaded guilty to second-degree murder and was sentenced to state prison for 15 years to life.

In 1994 while in prison, Jimenez changed his story about the shooting. Attributing his new version of events to his desire "to be honest" from his newly found religious faith, he denied having been the shooter. He explained he had pleaded guilty to murdering Valdez because he wanted to prove he was "macho" and feared fellow gang members would retaliate against his family if he identified the actual shooter. In 1998, Jimenez for the first time named the purported shooter. Until 2005, Jimenez continued to maintain he had not been the shooter, and although he recognized his protestations of innocence might reduce his chance of receiving parole, he claimed religious conviction compelled him to tell the truth of his innocence. In 2005, Jimenez reversed course and renewed his acceptance of responsibility in having shot Valdez.

In April 2009, the Board of Parole Hearings (the Board) found Jimenez suitable for parole. In September 2009, the Governor reversed the Board's decision to grant parole. The Governor acknowledged the progress Jimenez had made in prison toward rehabilitation. Jimenez had earned his GED, had completed vocational training and certification in several fields such as baking and air conditioning repair, had been entrusted by prison authorities with several institutional jobs including teacher's aide, had

successfully participated in numerous self-help and therapy programs, and had maintained “solid” and “close ties” with family and friends during his imprisonment.

The Governor nevertheless expressed doubts about Jimenez’s suitability for parole. In particular, the Governor questioned the sincerity of Jimenez’s remorse, which reflected on Jimenez’s insight into his offense. The Governor noted Jimenez had at first admitted shooting Valdez to avenge previous rival-gang attacks. Jimenez had explained he had shot Valdez “ ‘just to get even: ‘I didn’t think I was going to kill him.’ ” In 1994, Jimenez denied being the shooter and maintained his innocence for more than 10 years until 2005, when he reaffirmed his guilt in murdering Valdez. Based on Jimenez’s changing story, the Governor expressed concern about the likelihood of Jimenez reoffending on parole if he did not “completely understand and accept full responsibility for his offense.” The Governor explained:

“Although Jimenez says he accepts responsibility for the murder, his decade of misrepresenting the facts to the Board, combined with his previous statements that his religion drove him to tell the truth when he was in fact lying, causes me to have serious doubts about the genuineness of his acceptance of responsibility and expressions of remorse. Moreover, his recent comments suggest that he still minimizes his responsibility for the crime by saying he was ‘taught wrong.’ ”

The Governor also rested his denial of parole on Jimenez’s offense having been “especially atrocious” because Valdez was unarmed and “did not pose any threat” to Jimenez when Jimenez killed him. In that vein, the Governor found Jimenez’s motive of gang retaliation “was extremely trivial in relation to the magnitude of the offense that Jimenez committed.” Finally, the Governor weighed Jimenez’s failure to secure a job offer before his scheduled parole date as counting against his parole suitability because gainful employment was important to his success outside prison.

Jimenez filed with the trial court a petition for writ of habeas corpus. The court found the record did not contain “some evidence” that Jimenez presented an unreasonable risk of danger to society. Rejecting the Governor’s reliance on Jimenez’s changing

accounts of the shooting, the court found those changes were not evidence of Jimenez's lack of insight or acceptance of responsibility. The trial court stated:

“The Governor believes that Petitioner lacks insight because Petitioner initially accepted responsibility for the crime, then for a decade denied he was responsible, then since 2005 claims he is the responsible person. This gives the Governor ‘serious doubts about the genuineness of his acceptance of responsibility and expressions of remorse.’ . . . Had Petitioner initially claimed he was innocent, then admitted guilt, then went back to claiming innocence the Governor may be correct in his belief that the changed stories lack credibility and could indicate a lack of insight. This is because lack of insight can be shown when one claims less culpability than the record demonstrates. [Citations.] To say that a denial of culpability continues to be evidence of current dangerousness five years after accepting responsibility would require this trial Court to impermissibly expand the rule of current case law.”

The court also found the Governor erred in deeming Jimenez's motive for shooting Valdez to have been trivial, and thus especially heinous. The court reasoned that a motive is trivial only if it is “materially less significant (or more ‘trivial’) than those which conventionally drive people to commit the offense in question.” (*In re Scott* (2004) 119 Cal.App.4th 871, 893.) The court observed that revenge was an unfortunately all too common reason for gang killings, and thus Jimenez's vengeful motive was not trivial.¹ The court granted Jimenez's petition for habeas corpus and ordered his immediate release. The Warden filed a notice of appeal. We issued a writ of supersedeas staying the release order pending the appeal and set the matter for oral argument.

¹ The court also found the Governor erred in counting against Jimenez his lack of a pending job offer. The court concluded Jimenez's prison acquisition of marketable job skills was sufficient on that score. Because the Governor's other reasons for denying parole, which we discuss in the main text, are sufficient to affirm the Governor's decision, we do not address what weight, if any, to give the need for Jimenez's immediate post-prison employment.

STANDARD OF REVIEW

When a trial court rests its habeas findings solely on documentary evidence in the parole record, we independently review the trial court's ruling. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.) We review the record to determine if it contains "some evidence" that supports the Governor's conclusion that the defendant poses an unreasonable risk to society which justifies denying parole; we affirm the Governor's decision if such evidence exists. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212; *In re Shaputis* (2008) 44 Cal.4th 1241, 1258; *In re Smith* (2009) 171 Cal.App.4th 1631, 1637.) "[T]he proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*In re Shaputis*, at p. 1254.) Habeas relief is proper only if the Governor's denial of parole is not supported by "any evidence," for such a decision would be arbitrary and capricious. (*In re Lawrence*, at pp. 1204-1205.)

DISCUSSION

The Warden contends the trial court erred in ordering Jimenez's release on parole because "some evidence" in the record supported the Governor's conclusion that Jimenez continued to pose a risk to society. We agree.

The Governor cited doubts about the genuineness of Jimenez's remorse as reflecting Jimenez's lack of insight into his crime. Genuine acceptance of responsibility can be an important measure of a defendant's suitability for parole. Conversely, an insincere embrace of responsibility can suggest unsuitability. (*In re Lee* (2006) 143 Cal.App.4th 1400, 1414; *In re Elkins* (2006) 144 Cal.App.4th 475, 495.) The record documented sustained lying by Jimenez about the shooting – lying either in admitting being the shooter, or lying in denying it. During the parole hearing at issue here, Jimenez admitted to at least a decade of lies:

“[Q] From 1994 until, roughly, 2004, ten years, you had at least three or four Parole Hearings, didn’t you? [¶] [A] Yes. [¶] [Q] And in each of those hearings, you told the Panels the same story, that you were not the shooter, that somebody else was, and you even named the shooter, didn’t you. [¶] [A] Yes. [¶] [Q] All of those were lies, weren’t they? [¶] [A] Yes.”

The Governor also cited doubts about Jimenez’s lack of insight into his reason for killing Valdez. Jimenez attributed his crime to having grown up in a gang and, through its influence, being “taught wrong.” The Governor concluded that Jimenez was not accepting full responsibility for his crime. A defendant’s insight and understanding of his reasons for committing his offense, and his attitude toward the crime, can be probative of a defendant’s risk of reoffending. (*In re Lawrence*, *supra*, 44 Cal.4th at pp. 1219-1220 [incomplete acceptance of responsibility probative of future dangerousness]; *In re Taplett* (2010) 188 Cal.App.4th 440, 450; *In re Smith*, *supra*, 171 Cal.App.4th at p. 1638.) The Governor was entitled to conclude Jimenez’s seeming lack of insight and acceptance of responsibility meant he continued to pose an unreasonable risk to society. (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1260 [defendant’s lack of insight can be some evidence of unsuitability for parole]; *In re Smith*, *supra*, at p. 1639.)

The Governor also cited the seriousness of Jimenez’s crime as a reason for denying parole. The Governor may judge evidence of a defendant’s future dangerousness more cautiously, and indeed harshly, against the defendant than the Board which voted to grant him parole. (*In re Prather* (2010) 50 Cal.4th 238, 257, fn. 12; *In re Lawrence*, *supra*, 44 Cal.4th at p. 1204.) Here, however, we need not indulge that rule because the Board was itself harshly condemnatory of Jimenez’s cruelty in murdering Valdez. The Board described the murder as “particularly troubling, offensive, and disturb[ing], and reckless.” In the Board’s estimation, Jimenez’s “crime exhibited viciousness and callousness” because Valdez was unarmed and Jimenez could have decided against firing his rifle, but did so anyway for “merely gang retaliation.” (*In re Lawrence*, *supra*, at p. 1228 [aggravated circumstances of crime can be evidence of threat

to public safety when coupled with defendant's lack of insight].) That many killings in today's world are gang-related does not make this one any less trivial.

Because we find "some evidence" in the record supports the Governor's finding that Jimenez continues to pose an unreasonable risk to society, we must affirm the Governor's reversal of the Board's granting of parole to Jimenez. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1212; *In re Shaputis*, *supra*, 44 Cal.4th at p. 1258.)

DISPOSITION

The trial court's order granting defendant Richard Jimenez's petition for writ of habeas corpus is vacated, and the Governor's September 2009 order denying parole is reinstated.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.